Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1472

IGNACIO PENA,

Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS,
EIGHTH SUPREME JUDICIAL DISTRICT, EL PASO, TEXAS

JURISDICTIONAL STATEMENT

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SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS,
EIGHTH SUPREME JUDICIAL DISTRICT, EL PASO, TEXAS

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the Court of Civil Appeals, El Paso, Texas, entered on August 10, 1977 affirming the granting of a summary judgment by the 45th District Court of Bexar County, Texas, which was rendered on August 19, 1976. On January 18, 1978, the Texas Supreme Court refused Appellant's application for writ of error finding no reversible error.

OPINIONS BELOW

The final judgment of the 45th District Court of Bexar County, Texas, which includes its findings is not reported but is set forth in Appendix A. The opinion of the Court of Civil Appeals, El Paso, Texas, is reported at 555 S.W.2d 184 and is set forth in Appendix B. The Texas Supreme Court did not render an opinion.

JURISDICTION

This action was instituted by the Appellant in the 45th District Court of Bexar County, Texas, under the Federal Employers' Liability Act, Sec. 1 et seq. as amended, 45 U.S.C.A. § 51 et seq. to recover for on the job injuries. On August 19, 1976, the 45th District Court entered its judgment granting Appellee's Motion for Summary Judgment. The Court of Civil Appeals, El Paso, Texas, affirmed the 45th District Court on August 10, 1977. A timely filed motion for rehearing was denied on September 7, 1977. The Texas Supreme Court refused Appellant's application for writ of error on January 18, 1978. Notices of Appeal to this Court were filed in the above-mentioned courts on April 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(1). Cases that sustain the jurisdiction of this Court include *Miles vs. Illinois Cent. R. Co.*, 316 U.S. 698 (1942); *Schlemmer vs. Buffalo, etc., R. Co.* 205 U.S. 1 (1907); *Brown vs. Western Ry. of Ala.*, 338 U.S. 294 (1949); *Seaboard Air Line R. Co. vs. Horton*, 233 U.S. 492 (1914); *Toledo, etc., R. Co. vs. Slavin*, 236 U.S. 545 (1915).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 7 § 2 of the Constitution of the United States provides in pertinent part as follows:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made or which shall be made, under the authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the contrary notwithstanding."

The Seventh Amendment to the Constitution of the United States provides in pertinent part as follows:

> "in Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law."

The applicable statutory provisions involved, herein are the Federal Employers' Liability Act, Sec. 1 et seq. as amended, 45 U.S.C.A. Sec. 51 et seq. which reads in pertinent part as follows:

> "every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and foreign nation or nations, shall be liable in damages to any persons suffering injury while he is employed by such carrier in such commerce, or, in case of the death

of such employee, to his or her personal representative, for the benefit of surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track road bed, works, boats, wars or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely insubstantially, effect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

QUESTIONS PRESENTED

1) Whether the 45th District Court of Bexar County, Texas, erred in granting Appellee's Motion for Summary Judgment when Appellant through his affidavit raised genuine, material and disputed issues of fact concerning the validity of the release in question. Appellant raised genuine issues showing the possibility of mutual mistake which would void the release.

2) Whether Court of Civil Appeals, El Paso, erred in holding that State procedure was controlling over federal law thus depriving Appellant of his right to jury trial granted to him under the Federal Employers' Liability Act.

STATEMENT OF THE CASE

Appellant filed this case in the 45th District Court of Bexar County, Texas seeking a judgment for $97,500.00 for injuries sustained by the Appellant on or about December 28, 1974, while working as an employee of the SOUTHERN PACIFIC TRANSPORTATION COMPANY on railroad property just East of Uvalde, Texas. Appellant was working for the Appellee as a signalman and a part of his said duties on the date mentioned was to lift and move large heavy blocks of concrete to clear the right-of-way of Appellee. As Appellant was lifting a large heavy piece of concrete he suffered serious injuries to his groin and back area. Appellant alleged that his injuries resulted from his employer's negligent acts, and, therefore brought his action under the Federal Employers' Liability Act. The SOUTHERN PACIFIC TRANSPORTATION COMPANY filed its answer denying Appellant's allegations and further asserting that the Appellant had entered into a compromise settlement with the Appellee and that the Appellant had released and forever discharged Appellee for any and all claims, demands or causes of action arising out of the occurrence which was the basis of Appellant's Original Petition. After interrogatories had been filed and answered by both sides the Appellee, SOUTHERN PACIFIC TRANSPORTATION COMPANY, filed its Motion for Summary Judgment. Both Appellant and Appellee presented evidence by way of affidavits. (Appellee, at this time objected only to the lateness of Appellant's affidavit and the Court in its discretion accepted it though it was filed late. Appellant's affidavit is set out in Appendix C). After The Honorable Judge Fred Shannon, Judge of the

45th District Court of Bexar County, Texas, accepted and considered the affidavits he granted Appellee's Motion for Summary Judgment.

Appellant timely filed his Notice of Appeal and perfected his appeal in the Court of Civil Appeals, El Paso, Texas. The Court of Civil Appeals ruled, that on August 10, 1977, that state procedure was controlling over federal law and thus Appellant had not presented any summary judgment evidence at all to refute Appellee's evidence offered in favor of summary judgment and thus affirmed the trial court's granting of a summary judgment to the SOUTHERN PACIFIC TRANSPORTATION COMPANY.

HOW THE FEDERAL QUESTION WAS RAISED

Appellant originally raised the federal question in his original petition and at the hearing before the trial judge on the Motion for Summary Judgment. The trial judge was reminded at that time that this was a case under the F.E.L.A. and that the U.S. Supreme Court in a number of decisions had always been very solicitous towards injured railroad employees and their right to a trial by jury.

Appellant in his Motion For New Trial, which is set out in Appendix D, pointed out to the court that validity of a release attacked in an F.E.L.A. case is governed by federal law and that mutual mistake is a ground for voiding a release with respect to liability under the F.E.L.A. In that same motion the standard for summary judgment under federal law was brought to the attention of the court along with this Court's opinions explaining those matters. These very same matters were presented to the Court of Civil

Appeals in Appellant's brief which he filed in that court. In the Court of Civil Appeals opinion which is set out in Appendix B it stated:

> "This case is governed by Texas law of procedure and by federal substantive law; therefore, the validity of the release and the defenses of its validity are governed by federal law. *Dice v. Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359 (1952)."

The Court of Civil Appeals in citing *Dice* apparently failed to read key note 2 *Courts* which states the following:

> "State laws are not controlling in determining what are incidents of federal rights given to employees under the Federal Employers' Liability Act, but, in order to avoid defeating by states of federally declared standard and to give uniform application of act throughout country, such incidents must be determined according to a uniform federal law."

Thus the Court of Civil Appeals of El Paso, Texas, looked at the problem head on and still decided that state procedure would control over federally created rights. Finally, Appellant in his application for writ of error to the Texas Supreme Court set out the previously mentioned contentions concerning summary judgment and the right of an F.E.L.A. worker to a trial by jury and also set out the three decisions of this Court which squarely hold that state procedure will not defeat a federally created right when it is plainly and reasonably presented to the Court. Appellant's application for writ of error is set out in Appendix E. However, as has already been noted, the Texas Supreme Court refused Appellant's application for writ of error finding no reversible error.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

The decisions below encroach upon the rights of employees under the Federal Employers' Liability Act. They are in conflict with applicable decisions of this Court construing that statute.

The trial court concluded that a railroad defendant in an F.E.L.A. case, which enjoyed the benefits of an employee's services for many years could defeat his just claim for recompense for injuries suffered. Both the original court and the appeals court, under the F.E.L.A., improperly withheld from the province of the jury disputed fact issues which would have voided the release in question.

The decision of the Court of Civil Appeals, El Paso, Texas, is in clear conflict with a long and continuing series of cases decided by this Court demanding that such issues be submitted to the jury. Reversal of this decision is a necessity under the current rules of law and to carry out the Congressional intent of that body of legislation commonly referred to as the Federal Employers' Liability Act and to insure uniform application of this federal law throughout the country.

There is a clear conflict between the decision of the Court of Civil Appeals, El Paso, Texas, and this Court. Standards enunciated by this Court for submission of a cause tried under the auspices of the Federal Employers' Liability Act are most clearly set forth in *Rogers vs. Missouri Pacific R. Co.*, 356 U.S. 326 (1958), in which this Court clearly stated that, "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the

slightest, in producing the injury or death for which damages are sought." This Honorable Court has continued to uphold and enforce this standard through numerous cases brought before this Court on this very issue. In *Bailey vs. Central Vermont Ry.*, 319 U.S. 350 (1943), Mr. Justice Douglas refers to a jury trial as a "goodly portion of the relief Congress has afforded" in an F.E.L.A. case. In *Tennant vs. Peoria & P.U. Ry.*, 321 U.S. 29 (1944) and in *Lavender vs. Kurn*, 327 U.S. 645 (1946), this Court showed a very solicitous attitude toward F.E.L.A. plaintiffs, especially in directed verdict cases which would, of course, be analogous here since a summary judgment was granted against the F.E.L.A. plaintiff in this case.

The Court of Civil Appeals, El Paso, Texas, erred when it held that state procedure would control in Appellant's case over federal law. This Court in *Arnold vs. Panhandle & Santa Fe Railroad Co.*, 353 U.S. 360 (1957), held "that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." In support of this position, the Court cited *Davis vs. Wechsler*, 263 U.S. 22 (1923); *Dice vs. Akron, Canton & Youngstown Ry. Co.*, 342 U.S. 359 (1952); and *Brown vs. Western Ry. Co.*, 338 U.S. 295 (1949). A study of these cases will show that this Court apparently was seeking to do three things through these aforementioned decisions. 1) To make sure that federal supremacy is not thwarted. 2) To preserve its appellate jurisdiction. 3) To have a uniform application of the F.E.L.A. throughout the country. This point was also made by this Court in *American Ry. Express Co. vs. Levee*, 263 U.S. 19 (1923), in which this Court was concerned about state procedure eroding a federal right which, of course, would contravene federal law.

The 45th District Court of Bexar County, Texas, erred in granted Appellee's Motion for Summary Judgment. Appellant's affidavit which is set out in Appendix C raises a disputed fact concerning mutual mistake which would void the release in question and this Court is certainly fully aware of the standards under which a summary judgment should be granted and this is certainly a case where a summary judgment should not have been granted. The F.E.L.A. and cases thereunder and the federal law of summary judgment are applicable when considering the merits of Appellant's affidavit. Article 23 (18), Tex. Rev. Civ. St. Ann. (1969) provides that *an affidavit must be signed by the party making it.* (Our Emphasis). Rule 56 of the Federal Rules of Civil Procedure, of course, is like the common law in that it does *not* require that the affiant sign the affidavit. This is an "exacting" requirement that is peculiar to Texas law. In other words, under federal law, if a statement is reduced to writing and the truth of it is sworn to before someone who is authorized to administer an oath; than it is a valid affidavit. *Farm Bureau Mut. Ins. Co. v. Hammer,* 83 Federal Supp. 383. A quick examination of Appellant's affidavit shows that all of these requirements were met and that he was sworn by a notary who was a person authorized to administer an oath in Texas. No more is required under federal law. Under the liberal standards that this Court has set up in F.E.L.A. cases there is no question that Appellant in his affidavit raised a material issue of fact. This Court in *Chicago M. & St. Ry. vs. Coogan,* 271 U.S. 472 (1925), held that the kind and amount of evidence required in an F.E.L.A. case should be decided under federal rules and federal law. The court has often stated that the resolution of close or doubtful questions is necessarily for the jury. *Wilkerson vs. McCarthy,* 336 U.S. 53 (1949).

CONCLUSION

The decisions below conflict with decisions of this Court. The decisions below cannot be sustained on the grounds advanced by the courts below to sustain them. Probable jurisdiction should be noted and the case set for argument on the merits.

Respectfully submitted,

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APPENDIX A

NO. 76 CI-12113

IGNACIO PENA	)(	IN THE DISTRICT COURT
	)(	
V.	)(	45TH JUDICIAL
	)(	DISTRICT
SOUTHERN PACIFIC	)(	
TRANSPORTATION	)(	BEXAR COUNTY, TEXAS
COMPANY	)(	

FINAL JUDGMENT

On this 9th day of August, 1976, came on for hearing the Motion for Summary Judgment filed be Defendant in the above-entitled and numbered case.

In support of its motion, Defendant has filed an affidavit and exhibits attached thereto. Plaintiff has responded by way of an affidavit by Plaintiff, which the Court, in its discretion, will consider although same was not filed on the day prior to the hearing as required by Rule 166A, Texas Rules of Civil Procedure.

Having considered these affidavits, the pleadings and interrogatories of the parties and the answers thereto, the Court finds there is no disputed issue of material fact which would tend to invalidate the release given for valuable consideration by Plaintiff to Defendant. The Court specifically finds that there is no summary judgment evidence which would support a contention of mutual mistake, since there is absent from the record any evidence which would tend to show that at the time Plaintiff executed

the release, he was suffering from a definable medical injury about which the parties could be mutually mistaken.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment filed by Defendant be and it hereby is in all things granted and that the above-entitled and numbered cause be and it hereby is dismissed with prejudice with costs taxed against Plaintiff, for which let execution issue if the same are not timely paid.

SIGNED and RENDERED this ____ day of ____, 1976.

_____

JUDGE PRESIDING

APPROVED AS TO FORM:

_____

DAVID Q. HAAG
Attorney for Plaintiff

_____

HOWARD P. NEWTON
Attorney for Defendant

APPENDIX B

Ignacio PENA, Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellee.

No. 6621.

Court of Civil Appeals of Texas, El Paso.

Aug. 10, 1977.

Rehearing Denied Sept. 7, 1977.

Employee, who suffered injuries in the course of his employment, brought action against employer under Federal Employers' Liability Act. The 45th District Court, Bexar County, Fred Shannon, J., entered summary judgment in favor of employer and denied employee's motion for new trial, and employee appealed. The Court of Civil Appeals, Stephen F. Preslar, C.J., held that: (1) validity of release executed by employee and defenses to its validity were governed by federal law; (2) where employer introduced complete and comprehensive release, burden was on employee to plead and establish such facts as would render release invalid, and (3) where instrument filed by employee was not sworn to as prescribed by rule but was simply acknowledged, instrument was not an "affidavit" and was not competent summary judgment evidence, and thus filing of instrument did not meet burden of showing invalidity of release.

Affirmed.

1. Commerce 62.21
Master and Servant 250¼

Case brought pursuant to Federal Employers' Liability Act was governed by Texas law of procedure and by federal substantive law. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Release 1

In action brought by employee against employer pursuant to Federal Employers' Liability Act, validity of release executed by employee and defenses to its validity were governed by federal law. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Judgment 184(2)

Where employer introduced release which was executed by injured employee and which was complete and comprehensive, introduction of release cast burden on employee, in defense of employer's motion for summary judgment, to plead and establish such facts as would render release invalid; since employer presented evidence negating any disputed issue of material fact, burden of going forward with evidence to show disputed facts rested on employee. Rules of Civil Procedure, rule 166-A.

4. Judgment 185.1(8)

Where instrument filed by employee in response to employer's motion for summary judgment in action brought against employer pursuant to Federal Employers' Liability Act was not sworn to as prescribed by rule but was simply acknowledged by notary who certified that employee executed instrument for purposes and consideration therein expressed, instrument was not an "affidavit" and was not competent summary judgment evidence. Federal Em-

ployers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; Rules of Civil Procedure, rule 166-A.

See publication Words and Phrases for other judicial constructions and definitions.

5. Judgment 185.3(13)

Where employee who suffered injuries in the course of his employment brought action against employer pursuant to Federal Employers' Liability Act, where employer filed motion for summary judgment, attaching release executed by employee and supporting affidavits, and where instrument filed by employee in response to motion for summary judgment evidence, so that employee presented no summary evidence to contradict validity of release, employee was precluded from recovering against employer. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; Rules of Civil Procedure, rule 166-A.

Downman, Jones & Granger, David Q. Haag, Houston, for appellant.

Matthews, Nowlin, Macfarlane & Barrett, Howard P. Newton, San Antonio, for appellee.

OPINION

STEPHEN F. PRESLAR, Chief Justice.

Appellant, Ignacio Pena, filed this action pursuant to the Federal Employers' Liability Act, 45 U.S.C. Sec. 51, seeking to recover damages for alleged injuries sustained in the course of his employment. The trial Court granted Defendant/Appellee's motion for summary judgment. We affirm.

Appellant suffered injuries in the course of his employment, in December, 1974, while he was lifting heavy concrete blocks. He suffered a hernia which was surgically repaired; thereafter, in return for a gross sum settlement of $3,676.94, on March 27, 1975, he executed a contractual release of all claims against his employer arising out of the occurrence of December, 1974. In 1975, he filed this suit alleging that the injury of December, 1974, caused a hernia and damage to his back. Appellee filed its motion for summary judgment attaching the release and supporting affidavits. Following the granting of summary judgment for Appellee, Appellant filed a motion for new trial in which, for the first time, he alleged that the release was a result of mutual mistake.

[1,2] This case is governed by Texas law of procedure and by federal substantive law; therefore, the validity of the release and the defenses to its validity are governed by federal law. *Dice v. Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

[3] Tex.R.Civ.P. 166-A provides that a summary judgment shall be rendered if it is shown that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. *Great American Reserve Insurance Company v. San Antonio Plumbing Supply Company*, 391 S.W.2d 41 (Tex.1965). The release, executed by Appellant, is complete and comprehensive, and there is no question but that its effect is to foreclose any recovery by Appellant. Before the Court, with its supporting affidavits, it was a valid defense to this cause of action. This cast the burden on Appellant to plead and establish such facts as would render it invalid. *Ellis v.*

Woods, 453 S.W.2d 509 (Tex.Civ.App.—El Paso 1970, no writ). Appellee having presented evidence negating any disputed issue of material fact, the burden of going forward with the evidence to show a disputed fact rested on Appellant. *Bingham v. Gibson Products Company, Inc. of Odessa*, 464 S.W.2d 713 (Tex.Civ.App.—El Paso 1971, writ ref'd n.r.e.). In an attempt to meet his burden, Appellant filed an affidavit which we have determined to be of no effect because it does not meet the requirements of Tex.R.Civ.P. 166-A.

[4,5] The affidavit was not sworn to as prescribed by Rule 166-A. It was simply acknowledged, i.e., the notary certified that Appellant "executed the same for the purposes and consideration therein expressed." It thus runs afoul of the holding of our Supreme Court in *Perkins v. Crittenden*, 462 S.W.2d 565 (1970). There it was held that a jurat is not the same as an acknowledgment for the purposes of summary judgment under Rule 166-A, and that the instrument was not an affidavit for purposes of the Rule, the Court saying:

> "An acknowledgment (that an instrument was executed for the purposes therein expressed) does not purport to be a certification that the person acknowledging it swears to the truth of the matter set out. It does not, at least within the spirit of Rule 166-A, constitute an 'affidavit' so as to constitute a 'sworn or certified' copy."

The Court cited with approval the same holding by the Austin Court of Civil Appeals in *Crockett v. Sampson*, 439 S.W.2d 355 (1969, no writ). It also distinguished its holding from that in *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1962), where it held that purely formal deficiencies in an affidavit raised for the first

time on appeal were waived where no exception was taken and there was no genuine issue of fact. It noted that in *Youngstown* the instrument was defective in certain respects and was subject to special exception, but that it was sworn to, it was an affidavit, and was subject to correction, while the instrument before it was not an affidavit at all within the definition of the Statute and did not constitute summary judgment proof. The instrument of the Appellant in the case before us is not an affidavit and is not competent summary judgment evidence. Therefore, the Appellant presented no summary judgment evidence to contradict the validity of the release.

The judgment of the trial Court is affirmed.

APPENDIX C

STATE OF TEXAS §

v. §

COUNTY OF BEXAR §

BEFORE ME, a Notary Public in and for Bexar County, Texas, on this day personally appeared Ignacio R. Pena, who being by me duly sworn, on oath says:

My name is Ignacio R. Pena. I am over 21 years of age, am of sound mind and competent to make this affidavit and am currently working as a signalman for the Southern Pacific Transportation Company.

I make this affidavit in connection with the lawsuit filed by myself in the 45th Judicial District Court, Bexar County, Texas, numbered 75 CI-12113 and styled Ignacio Pena v. Southern Pacific Transportation Company.

On or about December 31, 1974, near Uvalde, Texas while on duty as an employee of the Southern Pacific Transportation Company, I was injured on the job. I complained to fellow workers that my groin area and my back were hurting me as a result of the injury. The Southern Pacific Transportation Company sent me to the company doctor, Dr. James W. Nixon, Jr., who diagnosed a hernia and operated on me for a hernia. After the surgery, I told Dr. Nixon that my back was hurting and he said that I had not worked in a while and once I went back to work I would be okay. He said I was big and strong and I should go back to work.

Relying on what Dr. Nixon said, and because I was told by him to go back to work, I agreed to settle my case with

my employer. When I settled my case with the railroad I did not have a lawyer, nor did I consult with one concerning the settlement.

My settlement negotiations with the claims agent of the Southern Pacific Railroad were based on the fact that both I and the claims agent relied on Dr. Nixon, the doctor the railroad had sent me to, and that the doctor said that the hernia was the only injury I had and that I could return to work since I have recovered from the hernia operation. Based on what the Railroad doctor told me, I signed the release. Further, affiant sayeth not.

STATE OF TEXAS

COUNTY OF BEXAR

BEFORE ME, the undersigned authority, on this day personally appeared _____ known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this ____ day of _____, 1976.

_____

Notary Public in and for
Bexar County, TEXAS

APPENDIX D

NO. 75 CI-12113

IGNACIO PENA	§	IN THE DISTRICT COURT
	§	
VS.	§	OF BEXAR COUNTY,
	§	TEXAS
SOUTHERN PACIFIC	§	
TRANSPORTATION	§	45th JUDICIAL DISTRICT
COMPANY	§	

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

IGNACIO PENA, Plaintiff in the above styled and numbered cause, moves the Court to set aside its Judgment heretofore rendered against him on August 19, 1976, and to grant him a new trial herein on the following grounds:

I.

The Court, Judge Shannon, ruled that there was no definable medical injury about which Plaintiff and Defendant could be mutually mistaken. Plaintiff testified that he complained of back pain to the company doctor and signed a Release based on the company doctor's advice to him that his *hernia* was repaired and his back was hurting because he hadn't worked in awhile and that Plaintiff should go back to work. Plaintiff contends that he injured his back and that is a definable medical injury.

II.

Plaintiff contends that his settlement negotiations and Defendant's negotiations for the proferred Release were based on a mutual mistake in that both parties agreed to settle based on the *hernia*, and the Court erred in not finding grounds for mutual mistake.

III.

Plaintiff contends that the Court erred in ruling that under Rule 166A, Texas Rules of Civil Procedure and cases thereunder that Plaintiff had not presented a genuine fact issue to be determined by a Jury. Plaintiff opposed the Motion for Summary Judgment, and his burden under Texas law is to specify opposing evidence which will raise an issue as to a material fact (263 S.W.2d 832, error ref'd).

Plaintiff contends that this is a case with a material disputed fact, i.e., Release based on a hernia and not on back injuries and that the Court erred in granting Summary Judgment. 241 S.W.2d 236 (Tex. Civ. App. 1951, error ref'd N.R.E.)

IV.

There are disputed fact issues in this case raised by the Plaintiff through his pleadings, answers to interrogatories and sworn affidavit and the Court erred in ruling that Plaintiff had not raised genuine material issues of fact. The test in a Summary Judgment is the same for that in an instructed verdict. 375 S.W.2d 900.

V.

The Court erred in not adhering to the law as spelled out in In Re Price's Estate, 375 S.W.2d 900, in which the Court said:

> "The summary judgment rule, 166-A, has been somewhat strictly construed against the movant. It has been held that the courts should accord the party resisting the summary judgment more indulgence. Whelan v. State, Tex.Civ.App., (1952) 252 S.W.2d 271. The purpose of the rule is to eliminate patently unmeritorious claims, or untenable defenses and to avoid delays of trial where there is no genuine issue of fact. It was never intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact. The summary judgment is to be applied with caution and will not be granted where there is doubt as to the facts. Although the prompt disposal of judicial business is greatly to be desired, that is not the main objective. Penn v. Gulbenkian, 151 Tex. 412, 252 S.W.2d 929."

VI.

The Court erred in not applying the rule applicable to instructed verdict cases in that the evidence is viewed in the light most favorable to the party opposing the Motion for Summary Judgment which in this case is the Plaintiff. 358 S.W.2d 557.

VII.

The Court erred in ruling there was no genuine fact issue. Plaintiff settled with the Defendant for a hernia injury and not a back injury and Plaintiff so swore in his affidavit. In Great American Reserve Ins. Co. v. San Antonio Plumbing

Co., 391 S.W.2d 41 (1965), the Supreme Court said:

> "This is a summary judgment case; and in answering the above question, we must follow certain rules laid down by this Court. Rule 166-A, Texas Rules of Civil Procedure, provides that summary judgment shall be rendered if it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The burden of proof is on the movant, and all doubts as to the existence of a genuine issue as to a material fact are resolved against him. Tigner v. First Nat'l Bank, 153 Tex. 69, 264 S.W.2d 85 (1954); Gulbenkian v. Penn, 151 Tex. 412, 252 S.W.2d 929 (1952). In other words, the evidence must be viewed in the light most favorable to the party opposing the motion. Valley Stockyards Co. v. Kinsel, 369 S.W.2d 19 (Tex. Sup. 1963); Smith v. Bolin, 153 Tex. 486, 271 S.W.2d 93 (1954). If the motion involves the credibility of affiants or deponents, or the weight of the showings or a mere ground of inference, the motion should not be granted. All conflicts in the evidence are disregarded, and the evidence which tends to support the position of the party opposing the motion is accepted as true. Cowden v. Bell, 157 Tex. 44, 300 S.W.2d 286 (1957); Smith v. Bolin, supra; Gulbenkian v. Penn, supra. Evidence which favors the movant's position is not considered unless it is uncontradicted. If such uncontradicted evidence is from an interested witness, it cannot be considered as doing more than raising an issue of fact, unless it is clear, direct and positive and there are no circumstances in evidence tending to discredit or impeach such testimony. Cochran v. Woolgrowers Central Storage Co., 140 Tex. 184, 166 S.W.2d 904 (1943). This exception is especially true where the opposite party has the means and opportunity of disproving the testimony, if it is not true, and fails to do so. Valley Stockyards Co. v. Kinsel, supra; James T. Taylor & Son, Inc. v. Arlington Ind. School Dist., 160 Tex. 617, 335 S.W.2d 371 (1960); Owen Dev. Co. v. Calvert, 157 Tex. 212, 302 S.W.2d 640 at S.W.2d 722 (1943); Simonds v. Stanolind Oil & Gas Co., 134 Tex. 332, 136 S.W.2d 207 (1940). After all the evidence has been sifted in this manner, the Court must determine whether the movant is entitled to a judgment as a matter of law."

VIII.

The Court erred in not resolving any doubts against the moving party, the Defendant, since the Plaintiff by his sworn affidavit and answers to interrogatories raised doubts concerning the validity of the Release in question. Plaintiff raised a question concerning mutual mistake of the parties. It is not Plaintiff's burden to prove beyond any doubt; he by his evidence must only raise a doubt. "The burden of demonstrating the lack of a genuine issue of material fact is upon the movant, and all doubts are resolved against him." McDonald, Texas Civil Practice, Vol. 4, P. 1392, § 17.26 (VI) 345 S.W.2d 274.

IX.

This case is brought under the Federal Employers Liability Act. The Court erred in not adhering to federal law which states in Taylor v. Chesapeake and Ohio Railroad Company, U.S. Court of Appeals, Fourth Circuit, 518 F.2d 536:

A. Validity of a release attacked in a Federal Employers' Liability Act case is governed by federal law;
B. Mutual mistake is ground for voiding a release given with respect to liability under Federal Employers' Liability Act.

X.

The Court erred in not following federal law which states: "It is axiomatic that summary judgment is never authorized if there is any genuine issue of fact between the parties and that, in determining whether there is any such issue, the facts, including any legitimate inferences therefrom, are to be viewed in the light most favorable to the opposing party. See Adickes v. Kress & Co. (1970) 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142; Albert v. Chemical Leaman Tank Lines, Inc. (D.C.W.Va. 1972) 344 F.Supp. 1141, 1146, aff'd. 475 F.2d 1399, cert. den. 414 U.S. 858, 94 S.Ct. 164, 38 L.Ed.2d 108; Rodway v. United States Department of Agriculture (1973), 157 U.S. App.D.C. 133, 482 F.2d 722, 727; First National Bank of Cincinnati v. Pepper (2d Cir. 1972) 454 F.2d 626, 629.

WHEREFORE, Plaintiff prays that said judgment be set aside and that he be granted a new trial herein.

DATED August 26, 1976.

Respectfully submitted,

DOWNMAN, JONES &
GRANGER

By: /s/ David Q. Haag

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ATTORNEYS FOR
PLAINTIFF

APPENDIX E

NO. B-7128

IN THE
SUPREME COURT OF TEXAS
IGNACIO PENA,
PETITIONER
V
SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
RESPONDENT

APPLICATION FOR WRIT OF ERROR

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NO. B-7128

IN THE
SUPREME COURT OF TEXAS
IGNACIO PENA,
PETITIONER
V
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
RESPONDENT

APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

IGNACIO PENA, petitioner, respectfully presents this application for Writ of Error to the Honorable Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso, to review and correct the errors of law committed by said Court of Civil Appeals in cause No. 6621 on the docket of said Court entitled Ignacio Pena, appellant v. Southern Pacific Transportation Company, appellee, Motion For Rehearing having been overruled on September 7, 1977.

STATEMENT OF THE NATURE OF THE CASE

IGNACIO PENA prosecutes this application for Writ of Error from the Court of Civil Appeals' affirmance of the Trial Court's granting of a summary judgment in favor of Southern Pacific Transportation Company.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under subdivision 6 of Article 1728, V.A.T.C.A., as amended.

POINTS OF ERROR

POINT OF ERROR 1

The Court of Civil Appeals erred in not following the Supremacy Clause of the U.S. Constitution and the applicable federal law as interpreted by the U.S. Supreme Court which in numerous decisions has emphasized the right of an injured railroad worker under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 to trial by jury. This also defeats the U.S. Supreme Court's policy of uniform applications of the F.E.L.A. throughout the country. (Germane to the First Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 2

The Court of Civil Appeals erred in not following the U.S. Supreme Court in *Bailey vs. Central Vermont Ry.*, 319 U.S. 350 (1943), when Mr. Justice Douglas refers to a jury trial as a "goodly portion of the relief *Congress* has afforded," in an F.E.L.A. case. (Germane to the Second Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 3

The Court of Civil Appeals erred in not noting the solicitous attitude of the U.S. Supreme Court toward F.E.L.A. plaintiffs, especially in directed verdict cases. *Tennant vs. Peoria & P.U. Ry.*, 321 U.S. 29 (1944); *Lavender vs. Kurn*, 327 U.S. 645 (1946). (Germane to Third Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 4

The Court of Civil Appeals erred in failing to follow federal procedure concerning the form of the affidavit in question since plaintiff's affidavit conformed to federal law in that it was in writing, sworn to before one authorized to administer an oath, based on personal knowledge, and gave evidence similar to that given in trial which raised a material issue. (Germane to the Fourth Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 5

The Court of Civil Appeals erred in granting Summary Judgment when the trial court accepted plaintiff's affidavit in evidence and considered it, as it stated in its Judgment, and the Appellee failed to object to the form or contents of the affidavit. (Germane to the Fifth Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 6

The Court of Civil Appeals erred in failing to note that plaintiff's affidavit starts out with the administering notary stating that plaintiff was "sworn" and "on oath says:" and since this and the rest of plaintiff's affidavit meets the requirement of federal law and since plaintiff's affidavit was considered and accepted by the trial court in evidence and since it does raise a genuine fact issue, the Court of Civil Appeals should have ruled for plaintiff. (Germane to the Sixth Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 7

The Court of Civil Appeals erred in letting a procedural technicality of Texas Law deprive plaintiff of his right granted to him by the U.S. Congress under the F.E.L.A. and one which the U.S. Supreme Court has said on more than one occasion that the dichotomy between procedure and substance is unclear and that an injured man will not be deprived of his federal substantive right because of local or state practice. (Germane to Seventh Ground in Petitioner's Motion for Rehearing which is germane to Plaintiff's assignments of error in his brief.)

POINT OF ERROR 8

The Court of Civil Appeals erred in not applying in this case the law of *Dice vs. Akron*, for the proposition that when the assertion of federal rights are plainly and clearly made, they are not to be defeated by local practice. The Court cited this case in its Opinion. (Germane to Eighth Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 9

The Court of Civil Appeals erred in not following the law in *Brown vs. Western Ry. of Alabama*, 338 U.S. 294 (1949) which held that no state rule, whether it be called "substance" or "procedure," can be applied in an F.E.L.A. case if it will make it more difficult for the plaintiff to recover. Of course, here the plaintiff has been totally deprived of his right to a jury trial. (Germane to the Ninth Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 10

The Court of Civil Appeals erred in that it allowed state procedure to erode a federal right which controvenes the federal law. *American Ry. Express Co. vs. Levee*, 263 U.S. 19 (1923). (Germane to the Tenth Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 11

The Court of Civil Appeals erred in that, one, federal substantive law prevails in litigating a federal right; and that, two, state grounds for deciding a case involving a federal law will not bar review by the U.S. Supreme Court if the state grounds are *insubstantial.* The U.S. Supreme Court needs to preserve its appellate jurisdiction to make sure that *federal supremacy* is not thwarted. (Germane to the Eleventh Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 12

The Court of Civil Appeals erred in not ruling that plaintiff had raised a material issue of fact under the federal law of Summary Judgment. (Germane to the Twelfth Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 13

The Court of Civil Appeals erred in failing to consider the more liberal federal practice of Summary Judgment law since plaintiff offered evidence, other than affidavits, which raised a material fact issue and thus prevented a granting of Summary Judgment under federal law. (Germane to the Thirteenth Ground in Petitioner's Motion for Rehearing which is germane to plaintiff's assignments of error in his brief.)

POINT OF ERROR 1
(Restated)

The Court of Civil Appeals erred in not following the Supremacy Clause of the U.S. Constitution and the applicable federal law as interpreted by the U.S. Supreme Court which in numerous decisions has emphasized the right of an injured railroad worker under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 to trial by jury. This also defeats the U.S. Supreme Court's policy of uniform applications of the F.E.L.A. throughout the country.

POINT OF ERROR 2
(Restated)

The Court of Civil Appeals erred in not following the U.S. Supreme Court in *Bailey vs. Central Vermont Ry.*, , 319 U.S. 350 (1943), when Mr. Justice Douglas refers to a jury trial as a "goodly portion of the relief *Congress* has afforded," in an F.E.L.A. case.

POINT OF ERROR 3
(Restated)

The Court of Civil Appeals erred in not noting the solicitous attitude of the U.S. Supreme Court toward F.E.L.A. plaintiffs, especially in directed verdict cases. *Tennant vs. Peoria & P.U. Ry.*, 321 U.S. 29 (1944); *Lavender vs. Kurn*, 327 U.S. 645 (1946).

ARGUMENTS AND AUTHORITIES UNDER POINTS 1, 2, and 3

Petitioner has steadfastly maintained in his Motion For New Trial, in his Brief to the Court of Civil Appeals, and in his Motion for Rehearing, that the Federal Law and in particular Federal Employers' Liability Act, 45 U.S.C. Sec. 51 et seq. should be followed in ruling on respondent's Motion For Summary Judgment. Petitioner, in the alternative, also argued under applicable state law. However, the main thing of paramont importance is the Supremacy clause of the United States Constitution, U.S. Const. art. VII Sec. 2. Although the Court of Civil Appeals did not seem to think it very important, the United States Supreme Court, especially in F.E.L.A. cases but also in other federal law cases has been very concerned about

protecting its appellate jurisdiction. That is, if a case is decided on an insubstantial state ground the U.S. Supreme Court has always been especially interested and, of course, behind this interest is the Supremacy clause. The United States Supreme Court must preserve its appellate jurisdiction to make sure that federal supremacy is not thwarted. Going hand in glove with this same concern of the U.S. Supreme Court again especially in F.E.L.A. cases, is the uniform application of the federal law throughout the country. That is, the U.S. Supreme Court is concerned about Congress establishing a federal right and then having a party's rights diminished or changed because he happens to file his case in a state court. As is stated in *Dice vs. Akron, Canton and Youngstown Ry. Co.*, 342 U.S. 359, (1951), which was cited by the Court of Civil Appeals in its opinion, it says in head note 2,

> State laws are not controlling in determining what are incidents of federal rights given to employees under Federal Employers' Liability Act, but, in order to avoid defeating by states of federally declared standard and to give uniform application of act throughout country, such incidents must be determined according to a uniform federal law.

This concern for uniformity in the F.E.L.A. area is noted in the following United States Supreme Court decisions: *Brady v. Southern Ry.*, 320 U.S. 476 (1943); *Chicago, M. & St. P. Ry. v. Coogan*, 271 U.S. 472 (1926); *Western & Atlantic R.R. v. Hughes*, 278 U.S. 231 (1929). Also in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), the U.S. Supreme Court was again concerned about a state court through its procedure denying a person their federally created right. Although I do not mean to belabor the point,

the U.S. Supreme Court reiterated its same concern for desirable uniformity in adjudication of federally created rights in *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949).

Likewise the United States Supreme Court throughout the years in many decisions has stated that an F.E.L.A. claimant should have a right to have a jury decide the issues of this case rather than a court ruling in some peremptory manner. See *Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Ellis v. Union Pacific Ry.*, 329 U.S. 649 (1947); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Stone v. New York, C. & St. L.R.R.*, 344 U.S. 407 (1953). Of course, one of the most cited cases of the U.S. Supreme Court in this jury area and what it takes to go to a jury is *Rogers v. Missouri Pacific Ry. Co.*, 352 U.S. 500 (1957), which is one of the strongest and clearest expositions by the U.S. Supreme Court on an injured party's rights under the F.E.L.A.

As had already mentioned in Point of Error 3, the Court of Civil Appeals apparently has not noted the solicitous attitude of the U.S. Supreme Court in F.E.L.A. cases.

POINT OF ERROR 4
(Restated)

The Court of Civil Appeals erred in failing to follow federal procedure concerning the form of the affidavit in question since plaintiff's affidavit conformed to federal law in that it was in writing, sworn to before one authorized to administer an oath, based on personal knowledge, and gave evidence similar to that given in trial which raised a material issue.

POINT OF ERROR 5
(Restated)

The Court of Civil Appeals erred in granting summary judgment when the trial court accepted plaintiff's affidavit in evidence and considered it, as it stated in its judgment, and the appellee failed to object to the form or contents of the affidavit.

POINT OF ERROR 6
(Restated)

The Court of Civil Appeals erred in failing to note that plaintiff's affidavit starts out with the administering notary stating that plaintiff was "sworn" and "on oath says:" and since this and the rest of plaintiff's affidavit meets the requirements of federal law since plaintiff's affidavit was considered and accepted by the trial court in evidence and since it does raise a genuine fact issue, the Court of Civil Appeals should have ruled for plaintiff.

ARGUMENTS AND AUTHORITIES UNDER POINTS OF ERROR 4, 5 and 6

Petitioner maintained in his Motion for New Trial, his Brief to the Court of Civil Appeals, and his Motion for Rehearing, that the F.E.L.A. and cases thereunder and the federal law of summary judgment are applicable when considering his affidavit and the trial court's granting of Respondent's Motion for Summary Judgment. (Petitioner also unsuccessfully argued that the affidavit was valid under state law.) Article 23 (18), Tex. Rev. Civ. St. Ann. (1969) provides that an *affidavit must be signed by the party making it* (our emphasis) Rule 56 of the Federal Rules of

Civil Procedure, of course, is like the common law in that it does not require that the person giving the affidavit must sign the affidavit. This is an "exacting" requirement that is peculiar to Texas law. In other words, under federal law, if a statement is reduced to writing and the truth of it is sworn to before someone who is authorized to administer an oath, then it is a valid affidavit. *Farm Bureau Mut. Ins. Co. v. Hammer*, 83 F. Supp. 383. A quick examination of petitioner's affidavit shows that all these requirements were met and that he was sworn by a notary who is a person authorized to administer an oath in Texas. No more is required under federal law. Under the liberal standards that the U.S. Supreme Court has set up in F.E.L.A. cases there is no question that petitioner in his affidavit raised a material issue of fact. The requirement by Texas law that an affidavit be signed would certainly be considered by the U.S. Supreme Court in light of its prior decisions in the F.E.L.A. area to be an unnecessary or over exacting peculiarity of Texas State procedure and should not be something that would deprive petitioner of his federally created right. See *Brown v. Western Ry. of Alabama.*

POINT OF ERROR 7
(Restated)

The Court of Civil Appeals erred in letting a procedural technicality of Texas law deprive plaintiff of his right granted to him by the U.S. Congress under the F.E.L.A. and one which the U.S. Supreme Court has said on more than one occasion that the dichotomy between procedure and substance is unclear and that an injured man will not be deprived of his federal substantive right because of local or state practice.

POINT OF ERROR 8
(Restated)

The Court of Civil Appeals erred in not applying in this case the law of *Dice v. Akron*, for the proposition that when the assertion of federal rights are plainly and clearly made, they are not to be defeated by local practice.

POINT OF ERROR 9
(Restated)

The Court of Civil Appeals erred in not following the law in *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949) which held that no state rule, whether it be called "substance" or "procedure" can be applied in F.E.L.A. cases if it will make it more difficult for the plaintiff to recover. Of course, here the plaintiff has been totally deprived of his right to a jury trial.

POINT OF ERROR 10
(Restated)

The Court of Civil Appeals erred in that it allowed state procedure to erode a federal right which controvenes the federal law. *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).

POINT OF ERROR 11
(Restated)

The Court of Civil Appeals erred in that, one, federal substantive law prevails in litigating a federal right; and that, to state grounds for deciding the case involving a federal law will not bar review by the U.S. Supreme Court if the state grounds are insubstantial. The U.S. Supreme

Court needs to preserve its appellate jurisdiction to make sure that federal supremacy is not thwarted.

ARGUMENTS AND AUTHORITIES UNDER POINTS OF ERROR 7, 8, 9, 10 & 11

Petitioner has steadfastly maintained in his Motion for New Trial, in his Brief before the Court of Civil Appeals and in his Motion for Rehearing that this is a case that should be decided under federal law and under applicable F.E.L.A. decisions. Respondent in his brief to the Court of Civil Appeals pointed out the very problem that we are concerned about. On page 8 of his brief he says:

> This distinction between the application of Texas procedural law as it relates to summary judgment and federal law as to substantive matters is then blurred in the brief for appellant at pages 10 and 11, where *Adickes v. Kress & Co.*, 398 U.S. 144, 157, 90 Supreme Ct. 1598, 26 L. Ed. 2d 142 (1970) is quoted for the proposition that summary judgment cannot be granted where there exist a material disputed fact. Of course, Adickes and all the other cases cited on page 11 of brief for appellant are cases construing the *federal law of procedure* and are of *no relevance* in this case. (Our emphasis.)

Petitioner must heartily disagree with the Respondent on that point because that is the very heart of this case. The U.S. Supreme Court agrees with Petitioner and has agreed with his contentions on many occasions as will be set out hereafter. The *Dice vs. Akron* case had already been mentioned. In *Davis vs. Wechsler*, 263 U.S. 22, (1923), which was not an F.E.L.A. case, the U.S. Supreme Court

reversed the state court and in that opinion Mr. Justice Holmes said the following:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . . this principal is *general and necessary* . . . This is familiar as to the substantive law and for the reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. (Emphasis supplied).

Also see *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923), where again it was held that a procedural erosion of a federal right was automatically invalid because it controvened the federal law. In volume 30 of the University of Cincinnati law review at page 188, it mentions a case, *Patterson vs. Alabama*, 294 U.S. 600 (1935), that states the following:

> The negro defendant claimed that his rights under the equal protection clause of the U.S. Constitution were infringed by the exclusion of the negros from juries in the country where he was tried. The State Supreme Court sought to avoid the issue by holding that the defendant's appeal was not timely filed. The U.S. Supreme Court, after noting that in a companion case it had upheld the defendant's position on the constitutional question, remanded with a polite suggestion that the State Court would surely want to waive any procedural defects and consider the merits.

It has already been pointed out by Petitioner that this problem has its fundamental basis in the Supremacy Clause of the United States Constitution. Although this is an F.E.L.A. action, there is another non-F.E.L.A. case which

again points out the U.S. Supreme Court's hoidings in this area. In *Staub vs. City of Baxley*, 78 Supreme Ct. 277, (1958), the Court observed:

> At the threshold, appellee urges that this appeal be dismissed because, it argues, the decision of the Court of Appeals was based upon State procedural grounds and thus rests upon an *adequate* non-federal basis, and that we are therefore without jurisdiction to entertain it. Hence, the question is whether that basis was an *adequate* one in the circumstances of this case. "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or law of the United States, is necessarily a question of federal law and, where a case coming from a state court presents that question, this court must determine for itself the efficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the State Court." . . . Whether the constitutional rights asserted by the appellant were ". . . given due recognition, by the [Court of Appeals] is a question as to which [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . [for] if non-federal grounds, plainly untenable, maybe thus put forward successfully our power to review easily may be avoided."

Indeed the point seems so clear that Charles Alan Wright of the University of Texas Law School has stated in his *Law of Federal Courts*, 2nd Ed. at pages 173 and 174,

> . . . But there was no doubt that there was some area of procedure that the State could continue to regulate for

itself even in federal claim cases. Perhaps this is still true today, but if so this area of procedure has become so shrunken as to fall within maxim *deminimis.*

In a Texas case that was appealed to the U.S. Supreme Court *Arnold v. Panhandle & Sante Fe Ry. Co.*, 353 U.S. 360 (1957) the U.S. Supreme Court held that the assertion of federal rights was plainly and reasonably made, is not to be defeated under the name of local practice. A case that has already been mentioned and is directly in point is *Brown vs. Western Ry. of Alabama*, where the Court said:

> A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether the petitioner has been denied a right of trial granted him by Congress. This Federal right cannot be defeated by the forms of local practice. We cannot accept as final a State Court's interpretation of allegations in a complaint asserting it. This rule applies to F.E.L.A. cases no less than to other types. . . . Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws . . . Should this Court fail to protect federally created rights from dismissal because of over exacting local requirements for meticulous pleadings, desirable uniformity and adjudication of federally created rights could not be achieved.

Petitioner refers this Honorable Court to three law review articles which give an excellent exposition of the problem. The first article is entitled "Railroads-F.E.L.A.-State Procedure In Derogation of Federal Rights," 25 Tennessee Law Review 301 (1958). The second article is called "Editorial

Notes, Procedural Protection from Federal Rights in State Courts," 30 University of Cincinnati Law Review, 184 (1961). The third article is entitled "Substance and Procedure in State F.E.L.A. actions—the Converse of the Erie problem, 17, Ohio State Law Journal 384 (1956).

POINT OF ERROR 12
(Restated)

The Court of Civil Appeals erred in not ruling that plaintiff has raised a material issue of fact under the Federal law of summary judgment.

POINT OF ERROR 13
(Restated)

The Court of Civil Appeals erred in failing to consider the more liberal federal practice of summary judgment law since plaintiff offered evidence, other than affidavits, which raised a material fact issue and thus prevented a granting of summary judgment under federal law.

ARGUMENTS AND AUTHORITIES UNDER POINTS OF ERROR 12 and 13

Petitioner has steadfastly maintained both in his Motion For New Trial and his Brief to the Court of Civil Appeals and in his Motion for Rehearing that this case should be decided under the federal law of summary judgment. The U.S. Supreme Court in *Chicago M & St. Ry. vs. Coogan*, 271 U.S. 472 (1925), held that the kind and amount of evidence required in an F.E.L.A. case should be decided under federal rules and federal law. The Court has often stated that the resolution of close or doubtful questions is

necessarily for the jury. See *Bailey vs. Central Vermont Ry.*, 319 U.S. 350 (1943); *Lavender vs. Kurn*, 327 U.S. 645 (1946); *Wilkerson vs. McCarthy*, 336 U.S. 53 (1949).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application For Writ of Error has been mailed, U.S. Mail, First Class to Mr. Howard Newton, Matthews, Nowlin, Macfarlane & Barrett, 1500 Alamo National Building, San Antonio, Texas 78205, this the 6th day of October, 1977.

/s/ David Haag

DAVID Q. HAAG

Supreme Court, U. S.
FILED
MAY 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1472

IGNACIO PENA,

Appellant,

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS,
EIGHTH SUPREME JUDICIAL DISTRICT,
EL PASO, TEXAS

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1472

IGNACIO PENA,
Appellant,

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT, EL PASO, TEXAS

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, Appellee, Southern Pacific Transportation Company, moves the Court to dismiss or, alternatively, affirm the final judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District, El Paso, Texas.

The grounds for this motion are that this case is not within the appeal jurisdiction of this Court, that the

federal question involved was not properly raised and preserved below and that no substantial question is presented which warrants review.

QUESTIONS PRESENTED

Appellee considers the substantive questions presented by this appeal to be as follows:

(1) Whether the Court of Civil Appeals unlawfully deprived Appellant of a substantive federal right by applying the requirements of Texas law to Appellant's purported affidavit filed in a case based on the Federal Employers' Liability Act.

(2) Whether there is any relevant difference between the federal law and the law of Texas defining the requisites of an affidavit.

(3) Assuming the document in question was an affidavit, whether Appellant raised a material issue of disputed fact sufficient to preclude the rendition of summary judgment by the trial court.

STATEMENT OF THE CASE

This appeal presents for review a judgment of a Texas Court of Civil Appeals which purportedly holds a federal statute invalid. 28 U.S.C. § 1257(1) (Supp. 1977). Since Appellant ("Pena" or "Plaintiff") has never specified the rejected statutory provision, it is not surprising that Plaintiff has failed or is unable to comply with Sup. Ct. R. 15(1)(d) and specified the manner in which this holding came about. The only solution to

this dilemma is to review the proceedings in the courts below so that the issues which might concern this Court can be delineated and the point at which they were raised identified.

After rendition of summary judgment in this case by the trial court, Appellant filed a motion for new trial which is reproduced at Appendix D to the Jurisdictional Statement. The first eight paragraphs of this motion dealt exclusively with Pena's assertion that he had raised a genuine issue of material fact under the Texas standard of review and, for this reason, entry of summary judgment was error. In the ninth paragraph, Pena pointed out that the validity of the release upon which Appellee ("Southern Pacific" or "Defendant") based its motion for summary judgment was a question of federal substantive law; a premise which is undisputed. In the tenth and last paragraph of the motion, Pena contradicted his prior exposition on the Texas standard of review by obliquely suggesting that the trial court should have applied the standard for granting summary judgment established by federal courts interpreting the Federal Rules of Civil Procedure. Pena did not suggest to the trial court that the question of what may be considered as evidence on a motion for summary judgment, as opposed to the standard to be applied to such evidence, was a question of federal law, or that failure to apply federal law would unconstitutionally deprive Pena of his federal right to a jury trial.

In the subsequent appeal, Plaintiff reduced his assignments of error to three points which are set out in Appendix A to this motion. Pena first argued that he

had presented sufficient evidence, as that term is defined by Texas law, to raise a disputed fact issue. The second point of error conceded that Rule 166-A of the Texas Rules of Civil Procedure prescribed the standard to be applied to the evidence, but complained that the trial court had misconstrued relevant Texas decisions applying this standard.[1] Finally, Pena argued that the trial court had ignored the federal substantive doctrine of mutual mistake which, if proven, would invalidate his signed release of all claims. Even in the face of arguments by Southern Pacific that Pena's "affidavit" was no such thing under Texas law and Pena had thus presented no summary judgment evidence at all to the trial court, Plaintiff never suggested to the Court prior to its decision that federal law should be applied to this issue. The corollary of this issue, that application of Texas law in this instance would unconstitutionally deprive Pena of his federal right to a jury trial, was also not raised.

Following the decision of the Court of Civil Appeals, Pena completely abandoned the three points of error initially presented to that Court. In his motion for rehearing in the Court of Civil Appeals and application for writ of error in the Supreme Court of Texas, Pena for the first time asserted that federal rather than Texas law must be applied in determining whether the document appearing at Appendix C to the Jurisdictional Statement is an affidavit. And for the first time, there appears the claim that the basis for applying federal procedural law in the state forum is that Plaintiff will otherwise be unconstitutionally deprived of a substantive federal right.

1 Tex. R. Civ. P. 166-A was amended, effective January 1, 1978. References throughout this motion are to the rule in effect on the date judgment was entered and which is reproduced herein as Appendix B.

One further aspect of the record in this case which needs clarification is the basis for the Court of Civil Appeals' decision. At page 10 of the Jurisdictional Statement, Plaintiff suggests that the Court's decision turned on the fact that his "affidavit" was not signed. While the signature of the affiant is clearly required by Texas law, Tex. Rev. Civ. St. Ann. Art. 23(18) (1969), the Court of Civil Appeals did not reach this question. Instead, the decision clearly rested on the fact that Pena did not swear to the truth of the facts set out in the document and, instead, merely "acknowledged . . . that he executed the same for the purposes and consideration therein expressed." Jurisdictional Statement, Appendix C at 2.

ARGUMENT

I

This Case Is Not Within The Appeal Jurisdiction Of This Court

At no point during this proceeding has any Court made a ruling which would even suggest that the validity of any provision of the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., has been questioned; much less held invalid. As a result, the Court has no jurisdiction under 28 U.S.C. § 1257(1) (Supp. 1977). *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944), modified, 321 U.S. 754 (1944); *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 224 (1889).

None of the cases cited by Plaintiff in support of jurisdiction were decided on the basis of 28 U.S.C. § 1257(1) (Supp. 1977) or its predecessors. *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U.S. 454 (1915); *Seaboard Air Line R. Co. v. Horton*, 233 U.S. 492 (1914); and *Schlemmer v. Buffalo R. & P. Ry.*, 205 U.S. 1 (1907) were all decided prior to The Act of September 6, 1916, Ch. 448, § 2, 39 Stat. 726. The Act relieved the Supreme Court of its obligatory jurisdiction over FELA decisions by the highest state courts and made such review discretionary. See *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 524-531 (1957) (Frankfurter, J. dissenting). The cases cited by Plaintiff decided subsequent to 1916, *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949) and *Miles v. Illinois C. R. Co.*, 315 U.S. 698 (1942), were decided under the Court's certiorari jurisdiction. If this Court has jurisdiction, it clearly arises under the certiorari jurisdiction specified in 28 U.S.C. § 1257(3) (Supp. 1977).

II

The Federal Question Which Appellant Seeks To Have Reviewed Was Not Properly Raised And Preserved Below

In order for this Court to have jurisdiction under 28 U.S.C. § 1257 (Supp. 1977), a substantial federal question must be properly raised in the state court proceedings. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Zucht v. King*, 260 U.S. 174, 176 (1922). Moreover, the proper method of raising the question is normally dependent upon the particular state practice. *Michel v. Louisiana*, 350 U.S. 91, 93 (1955). Where, as here, the highest state court is silent on the question, a

presumption exists that the silence of the state court is due to want of proper presentation. *Street v. New York*, 394 U.S. 576, 582 (1969).

In this case, the precise question of whether federal or state law must govern the definition of an affidavit was not raised in the state courts until Pena moved for a rehearing in the Court of Civil Appeals. Under Texas law, such a delay precluded the Supreme Court of Texas from considering this issue. *Watson v. Glens Falls Insurance Company*, 505 S.W.2d 793, 797 (Tex. 1974); *Texas State Highway Department v. Fillmon*, 150 T. 460, 242 S.W.2d 172, 174 (Tex. 1951).

Even if Plaintiff could be deemed to have raised the question in the trial court, by virtue of paragraph X in the motion for a new trial, and in the Supreme Court of Texas, it is clear the Court of Civil Appeals was not given an opportunity to pass on the question prior to the motion for rehearing. Raising a question in the trial court and one of two appellate courts is insufficient to preserve the question for review in this Court where state procedure permits or requires that the question be pursued at each stage of state court review. *Beck v. Washington*, 369 U.S. 541, 549-54 (1962); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).

III

No Substantial Federal Question Is Presented In This Appeal

Plaintiff's assertion that the "affidavit" he filed in the trial court was sufficient under federal law to preclude summary judgment is premised on several

assumptions, none of which are true. The first is that federal law governs what testimony will be considered as evidence in an FELA case filed in a Texas court.

When the federal rights created by the Federal Employers' Liability Act are asserted in the state forum, the necessity arises to make the difficult distinction between substance and procedure in order to determine what law is to be applied. It is clear this Court has gone farther in exercising federal control over what is commonly characterized as state procedure in the context of FELA cases than in any other area. *Rogers v. Missouri Pacific Railroad Co., supra; Dice v. Akron, Canton & Youngstown R. R.*, 342 U.S. 359 (1952); *Brown v. Western Ry. of Alabama, supra;* see generally, Hart, *The Relations Between State And Federal Law*, 54 Colum. L. Rev. 489 (1954); Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551 (1960). These decisions, however, have focused on two areas which have no application here; namely the adequacy of a state court FELA plaintiff's pleadings and the amount of proof necessary to submit the issue of liability to a jury or bind a reviewing court to the jury's decision.[2] In view of the specific enunciation of a unique quantum of proof in 45 U.S.C. § 51, and the policy reflected thereby, it is not surprising the Court has mandated applica-

2 One commentator has suggested that *Brown v. Western Ry. of Alabama, supra*, which reviewed the sufficiency of an FELA plaintiff's petition in state court was really concerned with the state court's misconception of the quantum of evidence necessary to recover in an FELA action. Hill, *Substance and Procedure in State FELA Actions — The Converse of the Erie Problem*, 17 Ohio St. L. J. 384, 407 (1956).

tion of a uniform standard of reviewing the sufficiency of the evidence in the face of which unnecessarily burdensome state procedures must give way. While admittedly favoring submission of even the slightest factual dispute to a jury, this uniform standard has never been interpreted to require a jury trial in an FELA case in the absence of any evidence. *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943). The implication that an FELA plaintiff is absolutely entitled to a jury trial, either by virtue of the Seventh Amendment to the Constitution or the Act itself, has been rejected. *Id.*

In this case, the issue is not the quantum of proof or an unnecessary or unreasonable procedural requirement which bars vindication of the federal right, but rather the more fundamental question of whether Texas can establish minimal limits or requirements on the type of testimony which will be received as evidence. The requirement that the truth of the facts set forth by Pena be sworn to, before the testimony in the affidavit will be considered, is hardly of the type of over-exacting local procedure which thwarts the policy underlying the Federal Employers' Liability Act favoring jury trials and the application of a uniform quantum of proof. Unless the procedural rules of the several states are to be totally federalized when their courts are considering FELA claims, and a heretofore unrecognized absolute right to a jury trial exists, this case does not present a substantial federal question.

An even more compelling reason why no substantial federal question is presented for review is that the Texas requirement that an affidavit be sworn to is

identical to the prescription found in the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56(e); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) at note 16; *Baxter v. Railway Exp. Agency, Inc.*, 455 F.2d 693, 696 (6th Cir. 1972), cert. denied 409 U.S. 847 (1972); *Local Union No. 490, U. R. C. L. & P. Wkrs. v. Kirkhill Rubber Co.*, 367 F.2d 956, 958 (9th Cir. 1966). The fact that Pena was sworn by a notary is meaningless unless one proceeds to determine the purpose for which he was administered the oath. The acknowledgement demonstrates that Pena was not swearing to the truth of any facts. The court in *Miller Studio, Inc. v. Pacific Import Co.*, 39 F.R.D. 62, 65 (S.D.N.Y. 1965) considered this precise issue and reached the same conclusion.[3] See also *United States v. Galato*, 171 F.Supp. 169, 170 (M.D.Pa. 1959).

IV

No Material Issue Of Disputed Fact Exists Even Should Federal Law Be Applied

While not intending to present a brief on the merits, Southern Pacific would suggest that even if Pena's affidavit is considered as such, Plaintiff failed to raise a material issue of disputed fact. Specifically, even if this Court accepts the statements in Pena's affidavit as true, there is no fact issue to support a claim that Pena's execution of a release was premised on a

3 As has been noted, the issue at this stage of the proceedings is not whether Pena also had to sign this document. Even so, the case cited by Pena for the proposition that his signature was not necessary under federal law, *Farm Bureau Mut. Ins. Co. v. Hammer*, 83 F.Supp. 383 (W.D.Va. 1949), is not in point. Plaintiff also fails to note the case was reversed on other grounds at 177 F.2d 793 (4th Cir. 1949).

mutual mistake. There is nothing in the affidavit which tends to show that anything Pena was told by Southern Pacific or its agents was untrue, or that Pena had a back injury which was unknown at the time the release was signed and only became known at a later date. *Taylor v. Chesapeake and Ohio Railway Company*, 518 F.2d 536 (4th Cir. 1975); *Graham v. Atchison, T. & S. F. Ry. Co.*, 176 F.2d 819 (9th Cir. 1949); *Kiloski v. Pennsylvania Railroad Co.*, 96 F.Supp. 321 (D.Del. 1951). The absence of disputed facts would have entitled Southern Pacific to summary judgment whether the trial court had applied Rule 56 of the Federal Rules of Civil Procedure or Rule 166-A of the Texas Rules of Civil Procedure in passing on the motion. The standard of review under each rule is, in any event, identical. As a result, the Court in disposing of this case need not resolve the questions of which law the affidavit must satisfy and whether a state or federal standard of review must be utilized.

TREATING THE APPEAL PAPERS AS A PETITION FOR CERTIORARI, CERTIORARI SHOULD BE DENIED

Since Plaintiff has improvidently appealed from the judgment of the Court of Civil Appeals, this Court pursuant to 28 U.S.C. § 2103 (Supp. 1977) must consider the papers as a petition for certiorari. Certiorari should be denied for the reasons heretofore discussed and for the additional reason that Plaintiff has generally failed to comply with Rule 23 of this Court's Rules. At a minimum, Plaintiff has failed to comply with paragraphs 1(f), 1(j) and 4 of Rule 23.

CONCLUSION

This Court is ultimately being asked to endow with probative value a document which warrants none under federal or state law. Invoking the supremacy of federal law to overturn the reasonable application of Texas law to the "affidavit" filed by Plaintiff in this case is of no avail since the result would have been the same in a federal forum. For this and the other reasons discussed above, the appeal should be dismissed or affirmed or, treating the papers as a petition for certiorari, should be denied.

Respectfully submitted,

FERDINAND C. MEYER, JR.

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(512) 226-4211

Attorneys for Appellee,
Southern Pacific Transportation Company

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Motion to Dismiss or Affirm have been served to all parties required to be served as follows:

Mr. David Q. Haag
5959 West Loop South, Suite 666
Houston, Texas 77401

Plato Papps
Machinists Building
1300 Connecticut Avenue, S.W.
Washington, D.C. 20036

by United States Mail, postage prepaid and properly addressed, on this ____ day of May, 1978.

FERDINAND C. MEYER, JR.

APPENDIX A

Excerpts from Brief for Appellant, Ignacio Pena v. Southern Pacific Transportation Company, No. 15764, In The Court of Civil Appeals For the Fourth Supreme Judicial District of Texas, San Antonio, Texas

NO. 15764

IN THE
COURT OF CIVIL APPEALS
FOR THE FOURTH SUPREME JUDICIAL DISTRICT
OF TEXAS
SAN ANTONIO, TEXAS

IGNACIO PENA,
Appellant

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellee.

BRIEF FOR APPELLANT

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* * *

[3] *APPELLANT'S CONTENTIONS*

THE TRIAL COURT ERRED IN GRANTING THE DEFEDANT'S MOTION FOR SUMMARY JUDGMENT.

A. *Plaintiff presented sufficient evidence to raise a genuine issue as to material disputed facts.*

B. *The trial court improperly applied Texas Rule 166-A and the cases thereunder as to the granting of Summary Judgment.*

C. *This action is maintained under the Federal Employer's Liability Act. Trial court erred in not adhering to federal law concerning mutual mistake as a ground for voiding a release and concerning the granting of Summary Judgment.*

APPENDIX B

Tex. R. Civ. P. 166-A (1976), as amended Tex. R. Civ. P. 166-A (1977):

Rule 166-A. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that, except

as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. Promulgated by order of October 12, 1949, effective March 1, 1950. Amended by orders of October 1, 1951, effective March 1, 1952, and July 20, 1966, effective January 1, 1967; order of July 21, 1970, effective January 1, 1971.